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There is an abounding opportunity for new capital, investment, and infrastructure development in Mexico. But you need more than the ability to translate Spanish. REALTORS[®] in Texas can benefit their clients by understanding the nuances of real estate transactions in Mexico.

*Understanding
real estate in
Mexico*

by Mitch Creekmore

We're getting closer to Mexico.

No, the land isn't shifting, but NAFTA, technology, and sweeping changes in Mexican politics have forged a closer relationship between the U.S. (especially those of us in border states) and our neighbors to the south. Whether you have clients who might benefit from purchasing property in Mexico or you are entertaining thoughts of buying a vacation or investment property for yourself, the climate for real estate business is inviting.

Mexico is forecast to have a 7% growth rate for 2001 – double that of the U.S. economy. In addition, the Mexican peso is expected to remain at its current level in relation to U.S. currency. Couple this with continued foreign-investment law reforms and Mexico's heightened awareness of protecting foreign investment in the public and private sectors, and the result is an abounding opportunity for new capital, investment, and

condominiums, and timeshare projects – can now enjoy greater legal freedom and ownership rights under Mexico's new foreign investment law.

In Mexico, as in the United States, the transfer of real estate rights is administered by federal, state, and local laws. However, buying south of the border is not like buying property in the United States, and the worst a purchaser can do is to remain ignorant of the law and procedures involved in the conveyance of real estate in a foreign country.

Stay on your toes

Foreign purchasers should be aware of the same basic issues that any prudent buyer would consider when acquiring real estate in the United States. Additionally, they should not depend on the seller for information or advice about the property, because they have no way of knowing whether it is correct. The first thing a buyer must consider is whether the seller of

legal description, and whether there are any liens or encumbrances filed of record against the property. The buyer can also request a certificate of no tax liability (*certificado de no aduado*) from the local taxing authority.

The public notary in Mexico (*notario publico*) is responsible for the title search in Mexican transactions. However, the notary typically only examines the current deed and a current lien certificate, resulting in the possibility of a short or incomplete title history of the property. A foreign purchaser always has the option of hiring Mexican counsel or a U.S. title company to provide an opinion on the status of title.

Title to all real estate in the prohibited zone being acquired by foreign purchasers can only be legally vested and recorded in one of two ways: in a Mexican bank trust (*fideicomiso*) for all residentially declared property; or in a Mexican corporation for all nonresidential real estate. There is no gray area concern-

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infrastructure development in the country. With the slowdown in the U.S. economy, Mexico's real estate market would appear to be a viable alternative to other investment strategies.

It's not the same old Mexico

Purchasing real estate in Mexico has changed dramatically over the past five years for non-Mexican nationals. Beginning in 1994, the federal government of Mexico liberalized ownership provisions of all property within the constitutionally protected area known as the prohibited zone. This restricted area includes 100 kilometers along all natural borders, 50 kilometers along all coastlines, and all of Baja California. Prospective buyers outside of Mexico's borders seeking to buy tourist property – including housing developments,

the property has legal title to the property, and if so, whether the property can be legally transferred. Although this seems to be a logical and foregone precaution, there have been many documented transactions in which foreigners thought they had acquired real estate only to find out later that the seller was unable to transfer legal title. Very simply, the seller didn't own the property or he had not completed the required development procedures for the conveyance of the real estate.

A buyer should always ask the seller for a copy of the public deed (*escritura publica*) vesting title to the real estate. The buyer should request a copy of the lien certificate (*certificado de libertad de gravamen*) on the property that should indicate the owner of record, surface area and classification of property type, the

ing foreign acquisition in the restricted zone of Mexico.

Foreign nationals can be the sole and exclusive stockholders of a Mexican corporation that holds fee-simple title to nonresidential property in the prohibited zone. In any type of real estate acquisition in Mexico, non-Mexican purchasers must always register their ownership interest with the secretary of foreign affairs and must waive their rights to foreign government intervention in the event of a property dispute. This is known as the Calvo Clause, which is constitutionally mandated, and is contained in all bank trust agreements. It should be noted that Mexican banks, acting as trustee for a foreign buyer in a *fideicomiso*, make no warranty or guarantee of the title to the property in the trust nor do they provide any restitution in the

event of a title defect. Foreign buyers should consult U.S. or Mexican counsel regarding real estate transactions.

Civil code of Mexico defines contracts

Most real estate transactions in Mexico will have at least two contracts: first, an offer and acceptance (*oferta*) and/or a promissory agreement (*contrato de promesa*); and, second, a purchase sales agreement (*contrato de compraventa*). Specifically, the civil code of Mexico defines contracts as agreements that produce or transfer obligations and rights. In general, real estate contracts in Mexico must be recorded before a notary public and, to be binding on third parties, they must be filed with the public registry of property.

Once there is a written acceptance to the offer, it is recommended that the buyer's attorney draw up the sales contract or promissory agreement. Since this agreement is the single most important document the buyer will execute with the seller, and the agreement's contents will determine the terms and conditions

of the transaction, the buyer should insist that his attorney assume this responsibility.

Escrow agreements and earnest money – not like in the U.S.

There are many aspects of Mexican real estate deals that are very similar to transactions closed in the United States. While it would seem the basic terms and principles are the same, a foreign buyer is much better off to assume nothing. Two such terms are *escrow* and *earnest money deposits* (*depositos condicionales*). In the United States, an escrow agent or title company – or a person legally empowered to act as an escrow agent – will serve in the capacity of handling escrow functions and earnest monies. In all cases, the company or individual who carries out the escrow procedure is licensed and empowered by law to do so. They are legally responsible to see that the agreed-upon conditions of an escrow agreement are met before any funds are released.

This is *not* the norm in Mexico.

Historically, foreign purchasers have given earnest money as contractual

consideration to the seller. And in many cases, the real estate agent or “broker” involved in the transaction has served as an escrow agent. Real estate brokers are not licensed in Mexico and typically do not set up separate accounts for earnest money deposits. The caveat here is expressly made in bold letters: **If a foreign buyer is willing to give earnest money to the seller or the real estate agent in the transaction, be prepared not to get it back!**

A foreign buyer should always exercise caution and use common sense when it comes to his or her money. Today, a U.S. title company can provide escrow services with individual interest-bearing money market accounts for each purchase.

Notario publico participation in transaction is not the same as obtaining title insurance

Ultimately, foreign buyers get to the point where they are ready to have the transaction consummated and take title to the property. In Mexico, all real estate transactions and the legal conveyance of any type of prop-

Investing in Mexico not a “Punta Banda” story

News headlines blared in November 2000 when Americans were evicted from their homes in the Mexican municipality “Punta Banda” near Ensenada, Baja California. Though disturbing, we must understand that this situation is an aberration. Mexico has made significant changes to its foreign investment laws to promote, enhance, and protect foreign investment in the real estate sector.

The evictions demonstrate that in any country, title discrepancies exist, lawsuits get filed, and in some rare cases, buyers lose their property. To be educated and prudent buyers, we must understand the issues.

The American residents at Punta Banda are, on one hand, victims of possible fraud and misrepresentation concerning the developer's ability to enter into lease agreements for lots within the Baja Beach and Tennis Club. On the other hand, residents ignored the warnings and disclosure that the ownership of the land was in dispute and there was pending litigation to resolve the title matter.

The plaintiffs had given public notice that the developer did not own the property and that no one should build on it. The U.S. lessees trusted in the assurances given by the developer and the Ministry of Agrarian Reform. However, ownership of the land was overturned and the evictions occurred.

In that light, why should Americans not fear buying real estate in Mexico? Title assurances and ownership protections that exist today were not readily available when Americans built in Punta Banda 14 years ago. And remember that the property can probably be insured with a title insurance policy enforceable under U.S. jurisdiction guaranteeing ownership rights.

—M.C.

erty involve the participation of the *notario publico*.

Although the title translates to “public notary,” the notario publico’s responsibilities greatly exceed the formalization of signatures. Appointed by the governor of the state and the executive branch of the federal government for a particular state “district, notarios are attorneys who must pass two extensive examinations in order to receive their lifetime appointments.

In a typical transaction, they will prepare the deed of conveyance subject to the “protocolized” purchase-sale agreement. The notario brings buyer and seller together for the formalization of the property transfer, and they authorize the appropriate signatures upon execution of the *escritura*. And lastly, after the property transfer has been formalized, the notario will record the *escritura* with the public

ination concerning title documents, development permits, municipal approvals, paid taxes, plat and survey issues, recordation and registry compliance, along with the overall conveyance or “protocolization” procedure of the public notary. In order to issue an owner’s policy of title insurance and assume the inherent monetary liability that comes with the policy issuance, the insuring company must be as certain as possible regarding all of the various elements in the property transfer.

It is not often understood that in Mexico, not only does a title policy protect against recording errors, liens, encumbrances, encroachments, taxes, and boundary line disputes, but also against fraud, misrepresentation, impersonation, secret marriages, incapacity of parties, and undisclosed heirs. Even the best of notarios or attorneys may be unable to discover these title problems.

as RE/MAX, Century 21, and Coldwell Banker having established operations in Mexico, and through referral networks such as RELO, Texas REALTORS® have a variety of avenues to assist their clients in taking advantage of Mexico real estate investment opportunities. ★

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registry of property where the property is located.

Prior to the closing, the notario’s additional duties include: examining the documents of the selling party to ensure their accuracy and legitimacy; verifying title; and searching the public records to determine the status of the seller’s title to the property and the existence of liens against the property. The notario is also responsible for the collection and payment of all applicable property taxes and government transfer taxes.

As representatives of the state, however, notarios do not insure title to the real estate nor do they have any legal responsibility for title defects. In short, a purchaser cannot seek restitution against a notario in the event the purchaser suffers a monetary loss due to a title defect unless fraud, misrepresentation, or gross negligence could be proven in a Mexican court of law.

Issuing title insurance on Mexican real estate requires an in-depth exam-

Often, a real estate agent or broker may not tell a buyer about the availability of title insurance for Mexican property. Perhaps this is because the agent or broker is fearful that the transaction may be delayed because of a title company’s requirements. Real estate professionals must remember that possession of the property does not necessarily mean good and recorded title to it.

Working with Mexican real estate professionals

The Mexican Association of Real Estate Professionals (AMPI) now has a formal working relationship with the National Association of REALTORS® (NAR) to enhance relations between U.S. and Mexican real estate professionals. There are now commission-sharing arrangements between brokers in Texas and Mexico, which has been a problem because there is no formal licensing act in Mexico.

With major franchises such

Additional resources

If you want to learn more about real estate transactions in Mexico and around the globe, here are a few places to find more information.

- The Mexican Association of Real Estate Professionals has a Web site with a variety of information (all in Spanish). www.ampinacional.com.mx.
- Several larger local Texas REALTOR® associations have an international section and/or offer educational programs dealing with the subject of international real estate.
- NAR offers a Certified International Property Specialist (CIPS) designation for real estate professionals who focus on the international market. www.cipsnetwork.com.
- The International Real Estate Federation (FIABCI) is an international real estate organization dedicated to helping members understand and succeed in international real estate. www.fiabci-usa.com.
- The Association of Foreign Investors in Real Estate (AFIRE) is a trade association and a resource for principals and investors. www.afire.org.